No. 10-136

IN THE SUPREME COURT OF THE UNITED STATES

FEB 16 2011
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ROBERT HOREL, WARDEN

Petitioner,

v.

FELIX SOLORIO VALDOVINOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR RECONSIDERATION
OF ORDER OF REMAND**

RECEIVED
FEB 25 2011

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INTRODUCTION

There is no reason to remand this case for reconsideration in light of Harrington v. Richter, 131 S. Ct. 770 (2011), because the Ninth Circuit panel opinion gave the state court summary denial the level of deference required under the Anti-terrorism and Effective Death Penalty Act [hereinafter "AEDPA"] as clarified by Harrington v. Richter.

Harrington v. Richter states that:

> [a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, supra, 131 S.Ct. at 786-787.

As the Ninth Circuit found, the California court's failure to recognize the repeated, substantial, Brady[1] errors in this case was so lacking in justification as to be clearly unreasonable. Any other conclusion would be clearly unreasonable as that term is defined in AEDPA and Harrington v. Richter. No fair minded jurist, in an identification case where there is no corroborating evidence[2] could conclude

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[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] There was trial testimony that Valdovinos' car generally matched a description of the killer's car and Valdovinos left the state shortly after the shooting.

that the prosecution's failure to disclose multiple items undermining the (mis)identification was not material.

The prosecution failed to disclose: (1) a photograph of another man at the crime scene wearing a cowboy hat just as the killer was described to be dressed[3]; (2) a letter describing the killing as a drug killing, which directly impeached the prosecution's theory of the case and the testimony of its primary law enforcement witness; and (3) police documents concerning the drugs and gun found in the possession of the only witness who knew Valdovinos prior to the evening of the shooting which gave that witness a strong motive to give favorable testimony to the police. No reasonable jurist could find the combination of this undisclosed evidence was not material.

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[3] The importance of this evidence is demonstrated by the Attorney General's false argument to the California Court of Appeals that "only [Valdovinos] was wearing a cowboy hat, as the killer was...," Attorney General Brief in the California Court of Appeal at 43, as well as that court's reliance upon the clearly unreasonable factual finding that "only appellant was consistently identified as wearing a cowboy hat," to deny the original appeal in this case. Opinion by Court of Appeal of the State of California, Sixth Appellate District, filed August 23, 2000; Appendix to Petition for Writ of Certiorari [hereinafter "App."] at 99a.

I. THE NINTH CIRCUIT APPLIED THE DEFERENTIAL STANDARD OF REVIEW REQUIRED UNDER AEDPA.

The Ninth Circuit specifically employed the highly deferential standard of review set out in AEDPA, even as tightened by this Court in Harrington v. Richter. The Ninth Circuit specifically stated that:

> In accordance with the standard set forth in AEDPA, a court may grant a writ of habeas corpus only if the state court's ruling: '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' Valdovinos v. McGrath, 598 F.3d 568, 576 (9th Cir. 2010) [hereinafter "Valdovinos"], quoting 28 U.S.C. § 2254(d); App. 14a.

The Ninth Circuit also specifically quoted this Court's opinion in Schiro v. Landrigan, 550 U.S. 465, 473 (2007), emphasizing that: "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." Valdovinos at 576; App. 14a.

As indicated above, the Ninth Circuit specifically relied upon "the standard set forth in AEDPA" and specifically noted that, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect,

but whether that determination was unreasonable—a substantially higher threshold." Id.

The language and analysis of the Ninth Circuit opinion further demonstrates that the Ninth Circuit deferred to the state court which held that the failure to disclose the guns and drugs, *by itself*, was not a reversible Brady error. Valdovinos at 579-580; App. 20a-22a.

The summary denial, however, was clearly unreasonable as a result of the *combination* of the failure to disclose the drugs and gun *with* the newly discovered failure to disclose the photo of another man dressed as the shooter was described to be dressed wearing a cowboy hat, and the failure to disclose the letter describing the killing as a drug killing. The Ninth Circuit expressly found that this combined and repeated failure to disclose Brady information rendered the state court's summary denial unreasonable.

The Ninth Circuit wrote:

> Here, the appellate court found that further impeachment of Lopez would not have affected the trial or outcome. On its own, this finding is neither contrary to nor an unreasonable application of established federal law. However, we include the prosecutor's failure to disclose the gun and methamphetamine in the cumulative analysis below. Id. at 579; App. 20a.

The Ninth Circuit specifically stated that it was only when it viewed the suppressed evidence collectively, that the state court finding of no Brady error was clearly unreasonable:

> We find the cumulative effect of the suppressed evidence denied Valdovinos a fair trial. The prosecution's repeated failure to disclose evidence favorable to the defense leads us to conclude that Valdovinos did not receive a fair trial resulting in a verdict worthy of confidence. Thus, we reverse with regard to the Brady claim and remand with instructions to the district court to issue a writ of habeas corpus." Id. at 580; App. 22a.

Accordingly, the panel's express statements that it applied the highly deferential standard of review required under AEDPA, is consistent with the analysis in its opinion and should not be discarded.

In addition to the language in the opinion itself, at oral argument Judge Kleinfeld specifically acknowledged the difference in the standards of review on direct appeal and on habeas. Judge Kleinfeld specifically told the parties: "I would find this a lot easier to reverse on Brady grounds if it was a direct appeal, but it's AEDPA deference which really concerns me."[4] Then, in their written opinion, the panel specifically stated it was relying upon: "the standard set forth in AEDPA," and specifically noted that, "[t]he question under AEDPA is not whether a federal

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[4] http://www.ca9.uscourts.gov/datastore/media/2009/09/01/08-15918.wma, at 46 secs.

court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." Valdovinos at 575, App. 14a.

In addition to the language and analysis of the Ninth Circuit opinion, and Judge Kleinfeld's[5] specific acknowledgment of the difference in the standards of review on direct appeal and on habeas, Judge Kleinfeld signed the dissent in Richter v. Hickman, 578 F. 3d 944 (9th Cir. 2009) (en banc) which argued that the Ninth Circuit majority gave insufficient deference to the state court opinion in Harrington v. Richter; and described the AEDPA standard of review as "truly daunting." Richter v. Hickman, 578 F.3d 944, 977 (9th Cir. 2009), dissenting opinion. That dissent expressly stated that if "the matter is surely open to debate and discussion," AEDPA prohibits a reversal. Id. at 986. That dissent mirrors the language of this Court in Harrington v. Richter:

> "Objectively unreasonable" does not mean that we can grant the habeas petition if we merely disagree with the state court's decision, or would have decided oppositely in the first instance. [cit.] Nor can we decide that a state court was unreasonable *even if* we believe it committed a clear error. [cit.] Rather, to overturn the state court's decision, its judgment about counsel's performance must be so egregious that we cannot but be convinced that the court's decision is itself outside the bounds

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[5] Judge Fletcher was not a member of the en banc panel in Richter v. Hickman, 578 F. 3d 944 (9th Cir. 2009) (en banc).

> of reasonableness. Richter v. Hickman, 578 F.3d 944, 977-978 (9th Cir. 2009) (emphasis in original).

At the time the Ninth Circuit opinion was issued in this case, this Court had already granted cert in Harrington, and as the comments of Judge Kleinfeld and the language of the opinion demonstrate, the Ninth Circuit panel in this case was well aware of the "daunting" amount of deference required under AEDPA.

Even the Attorney General now admits that it "has not suggested that the Ninth Circuit applied *de novo* review to the California Supreme Court's decision," Petitioner's Reply at 4. Nevertheless, petitioner claims that the Ninth Circuit did not apply deference to the state court's summary disposition. This claim ignores the language of the Ninth Circuit Opinion, as well as the specific statement of one of the Judges at oral argument. Because the panel opinion gave appropriate deference to the state court, the Order remanding this case should be reconsidered.

II. ANY CLAIM THAT THE SUBSTANTIAL AND REPEATED BRADY ERRORS IN THIS CASE WERE NOT MATERIAL AND DID NOT UNDERMINE CONFIDENCE IN THE VERDICT WOULD BE CLEARLY UNREASONABLE.

Any claim that the substantial and repeated Brady errors in this case were not material and did not undermine confidence in the verdict would be clearly unreasonable. Any reasonable jurist would agree that in an identification case,

with no corroborating evidence, the type of evidence the state failed to disclose here was material.

The state had no forensic evidence connecting Valdovinos to the crime and Valdovinos has always maintained he is innocent. The state has repeatedly suppressed exculpatory evidence which is inconsistent with its theory of the case; and when that suppression has been discovered, the state has repeatedly sought to minimize its errors.

The Attorney General has repeatedly claimed the letter and photograph were not Brady material. That position is unreasonable. As the Ninth Circuit found, a claim that the letter and the photograph were not Brady material is clearly unreasonable.

In its Petition for a Writ of Certiorari and in its Reply to Brief in Opposition, the Attorney General seems to be arguing that if it is possible to make an argument to support the state opinion, then that opinion must be deferred to. This argument overlooks the requirement of AEDPA and Harrington v. Richter, that the argument *must be reasonable*. Just because the Attorney General can argue that space aliens put the letter and photo in the prosecution file, that does not make the argument reasonable.

The undisputed facts are that a letter was discovered in the prosecutor's file at the San Jose Police Department with the rest of the evidence in this case. Declaration of Kathleen Boyle filed in the Ninth Circuit, May 25, 2004; ER 127-129. That letter was accompanied by an envelope postmarked September 9, 1998, a month before the trial. See ER 154. That letter was never voluntarily disclosed by the state and was only discovered by independent defense investigation. See Declaration of Thompson Sharkey filed in the Ninth Circuit, May 25, 2004; ER 157.

The Attorney General also unreasonably argues that there is a dispute regarding whether the state possessed the photo of another man in a hat, and fantasizes that the defense knew of the photo. Again, this argument is unreasonable. If the defense knew of the hat, the defense would have been able to counter the argument made by the same Attorney General to the state court of Appeal: "only [Valdovinos] was wearing a cowboy hat, as the killer was." Attorney General Brief in the California Court of Appeal at 43.

Because the defense did not know of the photo of Mongia in the hat, the defense was unable to counter this false argument on appeal[6]. This

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[6] We are not contending that the particular deputy attorney general handling this case knew of the material in the prosecution file. Even if this particular deputy

misrepresentation by the Attorney General led to the clearly unreasonable "finding" by the state court of appeal that "only [Valdovinos] was consistently identified as wearing a cowboy hat." App. 99a. Unlike the Attorney General's claims, the record is clear. The prosecution failed to disclose the Mongia photograph.

Now that the suppressed Brady material has been disclosed, it is unreasonable to believe the Brady violations here do not "undermine confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 434. While we contend there is much more than a reasonable doubt that Valdovinos was the killer; there can be no dispute that the undisclosed and newly discovered evidence undermines confidence in the verdict. This was a simple identification case, and the undisclosed information undermines confidence in those prior, unnecessarily suggestive, in court show ups.[7]

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attorney general did not know of the photo and the letter, however, for Brady purposes, he is charged with knowledge of evidence in the prosecution file. The government's Brady obligation "is independent of whether, at the time, the prosecutor knew of the favorable evidence or appreciated its significance." United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2000), citing Kyles v. Whitley, 514 U.S. 419, 437-8 (1995).

[7] It is worth nothing that the only reason for the unnecessarily suggestive in court show ups was the prosecution's suppression of prior failed attempts at identification through a photo lineup.

As this Court recognized in United States v. Wade, 388 U.S. 218, 228 (1967), "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."

> Centuries of experience in the administration of criminal justice have shown that a conviction based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence. United States v. Jernigan, 492 F.3d 1050, 1054 (9th Cir. 2007), quoting Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978).[8]

There was no confession, statements by codefendants or any forensic evidence indicating Valdovinos was the shooter. The state had a letter indicating that Valdovinos did not do the crime and the crime was a drug murder. The state did not disclose that letter. The state knew its witnesses were shown photo lineups and did not pick out Valdovinos as the killer. The state did not disclose those photo lineups in time for them to be used. The state claimed the identification of Valdovinos was powerful, because "only [Valdovinos] was wearing a cowboy hat, as the killer was [wearing a cowboy hat]." The state did not disclose it had a

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[8] "Of more than 300 documented cases of wrongful conviction in the U.S., nearly two-thirds are the result of erroneous identification." California Innocence Project Frees Fifth Innocent Man, California Western School of Law News, Feb. 23, 2007, available at http://cwslnews.wordpress.com/2007/02/23/california-innocence-project-frees-fith-innocent-man/.

picture of another man at the bar wearing a cowboy hat. The state knew that when its witness Aurelio Lopez was arrested, he was on probation and in possession of a gun and more than an ounce of methamphetamine. The state did not disclose that information until after Lopez testified at a preliminary hearing. The state simply released Lopez and did not tell the defense that the state had decided not to charge Lopez with possession of the gun, the drugs or even violate his probation. Lopez did not testify at the trial and his preliminary hearing testimony was read to the jury.

No reasonable person would accept the Attorney General's argument that the evidence was powerful. Eyewitnesses who were shown two separate photo line-ups did not select Valdovinos as the shooter. Only later, when Valdovinos was being brought to court in a jail jumpsuit and shackles, was Valdovinos (mis)identified as the shooter. These unnecessarily unreliable identifications occurred only because the prosecution withheld important exculpatory evidence, the prior failures of the witnesses to identify Valdovinos in the photo lineups.

The California Court of Appeal found the identifications in this case reliable because it erroneously believed that of all the people at the scene of the crime, only Valdovinos "was consistently identified as wearing a cowboy hat." Opinion by the Court of Appeal of the State of California, Sixth Appellate District, filed August

23, 2000; App. 99a. We now know there was nothing unique about Valdovinos' head gear because the prosecution file contained a picture of another man at the bar where the shooting occurred wearing a black cowboy hat on the evening of the shooting, but the prosecution failed to disclose that picture to the defense.

We now know that Aurelio Lopez, the only witness[9] who knew Valdovinos prior to the shooting, was arrested in possession of a gun and drugs just before he told the police Valdovinos had a gun. We also know that the prosecution did not charge Lopez with those crimes, violate his probation, or serve him with a subpoena to secure his presence at trial.

We also now know the prosecution also failed to provide the information about the gun and the drugs and the failure to file charges to the defense in time for that information to be used to cross-examine Lopez.

We also now know that Lopez admitted to Juan Ledezma that he had done the shooting and had placed the blame on Valdovinos. See e.g., Valdovinos' Second State Habeas Petition; App. 111a.

We also now know that the police possessed a letter indicating that the murder was a contract killing involving drugs, a theory inconsistent with the

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[9] Lopez did not appear at the trial and his testimony from the preliminary hearing was read to the jury.

prosecution's theory of the case. This letter directly impeached prosecution witness testimony that there was no evidence connecting the murder to drugs. The prosecution did not disclose that letter to the defense-just as it failed to turn over the evidence of the attempted, but unsuccessful, identifications; evidence of the guns and drugs possessed by its star witness; and the photo of another bar patron dressed in the same fashion that the shooter was described as being dressed.

Singly and together, these multiple failures to disclose exculpatory information undermine confidence in the verdict in this case. No reasonable jurist can have confidence in this verdict. Because the state court's affirmance of that conviction was based upon an unreasonable application of settled federal law, the panel decision was correct and we request this Court reconsider its Order remanding this case for reconsideration in light of Harrington v. Richter.

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CONCLUSION

The panel here gave deference to the state court opinion. That deference, however, was overcome by the undisputed facts. This conviction was the result of a complete denial of due process and a misleading of the trier of fact. Remanding this case to the Ninth Circuit for reconsideration will only encourage the state to continue to hide evidence.

We respectfully request this Court reconsider its Order of Remand.

Date: 2/15/11

Respectfully Submitted,

Christopher Cannon
Attorney for Felix Valdovinos